Supreme Court, U.S.
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No. 01-1551

IN THE

Supreme Court of the United States

KENNETH PILIPSHEN,

Petitioner,

v.

IBM CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT IBM CORPORATION'S BRIEF IN OPPOSITION TO KENNETH PILIPSHEN'S PETITION FOR WRIT OF CERTIORARI

JOHN HOUSTON POPE
EPSTEIN BECKER & GREEN P.C.
250 Park Ave.
New York, New York 10177
(212) 351-4500

JAY GERBER *
HOGAN & HARTSON L.L.P.
875 Third Ave.
New York, New York 10021
(212) 918-3000

Counsel for Respondent IBM Corporation

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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STATEMENT OF THE CASE

The petition seeks review of an unpublished, non-precedent-setting summary order issued by the Second Circuit affirming a decision of the United States District Court for the Southern District of New York. The District Court granted a summary judgment motion dismissing, with prejudice, the complaint of Petitioner Kenneth Pilipshen ("Petitioner" or "Pilipshen").

Pilipshen, an employee of Respondent IBM Corporation ("IBM"), filed suit in May, 1999, alleging that he had been demoted in 1995, retaliated against (by being passed over for an award of stock options) in 1997, and passed over for

promotion to certain executive-band jobs in 1998 and 1999, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 620, *et seq.*, and the New York Human Rights Law, N.Y. Exec. L. §§ 290, *et seq.* ("NYSHRL").

In a thorough opinion issued on June 13, 2000, the United States District Court (Brieant, J.) held: (1) the 1995 demotion claim was time-barred under both the ADEA and the NYSHRL; (2) the 1997 retaliation claim was time-barred under the ADEA and without merit as a state law claim; and (3) the 1998 and 1999 failure-to-promote claims were without merit because Petitioner had failed to proffer sufficient evidence to establish pretext or improper conduct by IBM. While Petitioner has claimed here and in the Court of Appeals that the decision below does not adhere to *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), a case decided the day before the District Court ruled, he did not ask the District Court to reconsider before he appealed. Indeed, as discussed at pp. 7-10 *infra*, given the District Court's findings regarding Petitioner's failure to raise a legitimate issue regarding pretext, *Reeves* is inapplicable to this case.

On July 24, 2001, the Second Circuit affirmed the grant of summary judgment, adopting as its reasons those stated by the District Court. This summary disposition underscores that there are no compelling reasons why this case, which was resolved by the application of well-settled legal principles to undisputed facts, is worthy of this Court's attention.

Clarification Of The Record

The factual recitation set forth in the Petition does not correctly or concisely state the relevant, material facts, which are not genuinely disputed.

Pilipshen is currently employed by IBM as a tax attorney, and he has been for over twenty-five years. From 1986 to

1995, he held various positions in the Tax Department, mostly in the international tax area, that were classified as executive, with the title of "Director." At the time that Pilipshen was a "Director," the Tax Department had six other persons holding the title of "Director," all of whom were then members of the ADEA's protected class.

During 1994, IBM's uppermost management directed the Tax Department to reduce the number of "Director" executive positions as part of a company-wide reduction in costs and manpower. Pilipshen was one of two Directors in the Tax Department whose job was reclassified, from the executive "Director" position to a non-executive "Tax Counsel" position, while retaining the same salary and nearly all of the same benefits. This is the purported demotion about which he complains.

A few months after the so-called demotion, in June 1995, Pilipshen was transferred to Paris, where he stayed until June 2000. This was a coveted position in the Tax Department and one that Pilipshen actively sought. In late 1995 Pilipshen pursued a complaint about his "demotion" through IBM's internal grievance system (known as the "Open Door"), without success. In early 1996, he consulted a lawyer about the possibility of bringing a lawsuit, but he did not do so until more than three years later, after the statute of limitations had run.

In December 1996 Pilipshen's performance in Europe was criticized by IBM's Chief Financial Officer ("CFO") and an outside consultant, Walter Berman, who was advising IBM on tax-related business strategy. As a result, the CFO and Mr. Berman wanted to have him fired. Pilipshen's management team intervened and saved his job, one condition being that his performance rating for the calendar year 1996 (conferred in January 1997) was lowered. The lower performance rating ultimately disqualified Pilipshen for a discretionary

stock option award in March 1997. This lost award is the alleged act of retaliation about which he complains.

Mr. Berman's initiative, known as the Business Optimization Project ("BOP"), involved a company-wide, worldwide review of many aspects of the company's business, including tax strategies. As a result of the BOP review, the then-head of the Tax Department, Gary Carney, reorganized the Tax Department during 1998, expanding the number of director-level executive positions to seven.[1] The four incumbent directors received their assignments, leaving three positions—the Directors of Taxes for Intercompany Relations, Global Services, and Global Financing—to fill. These are the lost opportunities for promotion about which Pilipshen complains.

From the outset, it was a foregone conclusion that the newly created position of Director of Taxes, Intercompany Relations (formerly a business function that was moved into the Tax Department) was going to be filled by Paul Cramer, the incumbent in the non-executive position that was upgraded to create the new directorship. The promotion rewarded Mr. Cramer for his years of stellar performance in the specialized function of intercompany pricing (the setting of prices at which different subsidiaries of IBM buy and sell items between each other). IBM also wanted to provide him with an incentive to remain with the company, even though he had become eligible to retire at full pension. Mr. Cramer is only three years younger than Pilipshen and has nine years more service to IBM.

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[1] From 1995 through 1997 the number of Director positions in the Tax Department remained constant at four, and there was no turnover in the personnel who filled those positions. At the beginning of 1998, Robert Mattson, the head of the Tax Department who made the "demotion" decision in 1995, retired. He was replaced by Mr. Carney, who had been the second-in-command of the department. Both Mr. Mattson and Mr. Carney are older than Pilipshen.

It also was IBM's initial plan to fill both of the remaining two Director positions with external candidates—persons from outside of IBM, as a way of injecting different perspectives into the Tax Department. A formal search effort was undertaken by a consulting firm to find and screen appropriate senior-level candidates. This process disqualified *every* incumbent IBM employee, regardless of age. As a result of this search, IBM hired Michael Wallace, the former head of the Tax Department at Tandem Computers, in September 1998. He became the Director of Taxes, Global Services.

The external search process, however, was unsuccessful in finding a candidate to fill the third position, so IBM looked at qualified internal candidates. In March 1999, Juda Chetrit was selected to be the Director of Taxes, Global Financing, a position that directly supported IBM's financing subsidiary, IBM Credit Corporation. Mr. Chetrit's prior work, which included an active role in the BOP, was highly regarded, and he had prior relevant business experience, both at IBM and from his prior employment at companies comparable to IBM.

Pilipshen had not been under consideration as a candidate for any of the directorships filled in 1998 or 1999. For the first two positions filled, he shared this fate with every other IBM employee, save incumbent Mr. Cramer. For the last position filled, Pilipshen was not a logical contender. He was regarded as an international tax specialist and his only remotely relevant experience involving IBM Credit was fifteen years earlier. Even then, there was negative feedback about Pilipshen from the businessperson supervising that 1984 project.

The Decisions Below

The District Court granted summary judgment on the promotion claims because Pilipshen had no evidence to discredit the bona fides of IBM's explanation for its promotion decisions. Petitioner's only real argument, both

here and below, is that IBM *should not* have used the criteria it did to make its employment decisions. The issue of pretext, however, is whether the defendant *did not* actually base its decisions on its stated reasons. Pilipshen's arguments, in this Court and the courts below, have contributed nothing to this crucial issue. While the District Court accepted that Pilipshen may have established a prima facie case on the promotion claims, it concluded that he did not make *any* showing of a pretext by IBM.

Additionally, the District Court rejected Pilipshen's "demotion" and retaliation claims as time-barred under federal law. (The "demotion" claim also was untimely under state law.) The District Court also considered the merits of the retaliation claim under state law and concluded that Pilipshen had failed to establish a prima facie case. The Court of Appeals affirmed, in a summary order.[2]

REASONS FOR DENYING THE PETITION

There are no compelling reasons for this Court to review this case. The decisions below involve the most routine application of the most basic principles of law. In short, this Petition concerns an unremarkable case which has no significance to anyone other than the parties. The District Court's opinion is unpublished. The summary order of the Court of Appeals was not officially reported[3] and is of no precedential value under the local rules of the Second Circuit. *See* 2d Cir. R. 0.23; *Crocco v. Xerox Corp.*, 137 F.3d 105,

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[2] Although the Petition accuses the Second Circuit of failing to exercise *de novo* review, the law of the Circuit establishes that a summary order, such as that entered below, "is issued after due consideration of the merits of the appeal, and the judgment entered determines, either explicitly or implicitly, all issues raised in the appeal." *Furman v. United States*, 720 F.2d 263, 266 (2d Cir. 1983). Petitioner's innuendo is an unwarranted and unsupportable attack on the court below.

[3] It is unofficially reported at 15 Fed. Appx. 20.

108 n.4 (2d Cir. 1998). The decisions below hold no sway over any future proceedings; this Court "cannot act as a court of simple error correction . . . ." *Overton v. Ohio*, 534 U.S. ___, 122 S. Ct. 389, 390 (2001) (Breyer, J., respecting denial of cert.); *accord Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). In essence, Petitioner is merely seeking yet another layer of appellate review of an adverse decision that denied his unsupported claims.

We will now address Petitioner's main argument points.

I. PETITIONER'S CASE DOES NOT RAISE ANY CERT WORTHY ISSUE CONCERNING THIS COURT'S DECISION IN *REEVES* (RESPONSE TO POINT I OF THE PETITION)

Petitioner's first point requests review on the ground that the Court of Appeals' decision represents an allegedly aberrant interpretation of this Court's recent decision in *Reeves*. The Petition should be denied because, even if Petitioner is correct that the Second Circuit is not properly applying *Reeves* in other cases (a contention we dispute [4]), that alleged "fault" did not contribute to the judgment against him in this case.

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[4] Petitioner's assertion is that the Second Circuit's approach conflicts with the approaches taken by the Fourth, Fifth and Eleventh Circuits. Recent cases from those circuits, however, suggest that all four of the circuits follow the same approach. *See, e.g., Cleary v. Nationwide Mut. Ins. Co.*, 9 Fed. Appx. 1, 6-7 (4th Cir. 2001) (not officially reported); *Rowe v. Marley Co.*, 233 F.3d 825, 830 (4th Cir. 2000); *Price v. Federal Express Corp.*, 283 F.3d 715, 721 n.4 (5th Cir. 2002); *Raggs v. Mississippi Power & Light Co.*, 278 F.3d 463, 468-89 (5th Cir. 2002); *Montemayor v. City of San Antonio*, 276 F.3d 687, 693 (5th Cir. 2001); *Walker v. Prudential Prop. & Gas. Ins. Co.*, 286 F.3d 1270, 1276-77 (11th Cir. 2002); *Wascura v. City of South Miami*, 257 F.3d 1238, 1246-47 (11th Cir. 2001); *Chapman v. AI Transport*, 229 F.3d 1012, 1025-26 (11th Cir. 2000) (en banc).

As this Court knows, *Reeves* asked "whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. at 140. This question examines the final stage of the three-step burden-shifting framework for analyzing circumstantial evidence of discrimination allegations that was first set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The familiar three steps are: (1) plaintiff's establishment of a prima facie case; (2) defendant's articulation of a legitimate, nondiscriminatory reason for its employment action; and (3) plaintiff's attempt to prove that the stated reason is, in reality, a pretext for unlawful discrimination. The burden on a plaintiff of presenting a "prima facie case" in a discrimination case is "minimal." *See, e.g., Rose v. NYP Holdings, Inc.*, 257 F.3d 164, 168 (2d Cir. 2001). Once an employer articulates its reason for an employment action, the presumption initially raised by the prima facie case disappears and no longer has any force. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510 (1993). The sole remaining issue then is "discrimination *vel non*." *Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

Importantly, "*Reeves* did not alter or amend the plaintiff's prima facie case." *Bryant v. Bell Atlantic Maryland*, ___ F.3d ___, No. 01-1541, 2002 WL 753435, at *7 (4th Cir. Apr. 29, 2002). Moreover, "*Reeves* in no way relaxed the requirement that plaintiffs make a showing that the defendant's proffered explanations were pretextual." *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 470 (2d Cir.), *cert. denied*, No. 01-278, 122 S. Ct. 460 (2001). The significance of *Reeves* lies in its re-affirmation of the principle that, in many instances, a jury may infer "discrimination *vel non*" from the establishment of the prima facie case *and* a finding that the employer articulated a pretextual reason for its actions. In those

instances, the facts allow the jury to reasonably conclude that the employer lied to conceal an illegal motive. *Reeves* also acknowledges that the facts of the particular case may foreclose or negate any inference of an illegal motive in such circumstances. 530 U.S. at 148-49.

Reeves has no application to the issues that resolved this case. Obviously, Petitioner's time-barred federal law claims for "demotion" and retaliation are not affected. Likewise, the disposition of the state law claim for retaliation, which was dismissed on the ground that Petitioner failed to establish all of the elements of a prima facie case, is unaffected. And, the dismissal of the promotion claims also is not called into question, because the District Court concluded, on the basis of the undisputed facts, that Petitioner failed to show that IBM's stated reasons for the promotions at issue were false or pretextual. The disposition of a case on that basis does not implicate the holding of *Reeves*. *See, e.g., Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 n.9 (9th Cir. 2002) ("Because [plaintiff] has not shown that [defendant's] reasons are pretextual, she does not even reach the final stage of adjudication contemplated by *Reeves*."); *Rowe v. Marley Co.*, 233 F.3d 825, 831 (4th Cir. 2000) ("*Reeves* does not assist [plaintiff] because he failed to demonstrate, with respect to any of his federal claims, that [his employer's] proffered nondiscriminatory reasons for discharging him were pretextual."); *Taylor v. QHG of Springfield, Inc.*, 218 F.3d 898, 900-01 (8th Cir. 2000) ("*Reeves* only helps [plaintiff] if she has produced sufficient evidence to reject the legitimate explanation. She has not, so *Reeves* does not mandate reversal."); *see also Auguster v. Vermilion Parish School Bd.*, 249 F.3d 400, 403 n.3 (5th Cir. 2001) ("Nothing in *Reeves* . . . abrogates [the] requirement of substantial evidence to support a claim of pretext.").

Petitioner's effort to manufacture a conflict among the circuits merely masks an agenda that he knows renders this

case unworthy of review. His arguments here rely on the premise that courts below erred as a matter of fact in reviewing the evidence of alleged pretext.[5] He contends they "have ignored crucial evidence going to the very guts of the issues before the court on summary judgment." (Petition, p.24.) He dangles the alleged circuit split as bait to try to hook this Court, but he cannot prevail on his claims unless he convinces this Court to engage in a very fact-specific inquiry into the record. This Court, however, "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). It should "decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases." *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (Stevens, J., respecting denial of cert.); *accord Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). Because a decision on the issue purportedly framed by the Petition's first point will not change the outcome of Petitioner's case without such a fact-specific inquiry, review should be denied. *See Somerville v. United States*, 376 U.S. 909 (1964); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959).

II. PETITIONER'S CONTENTIONS CONCERNING IBM'S USE OF EXECUTIVE REPLACEMENT TABLES DO NOT PRESENT ANY COHERENT ISSUE FOR REVIEW (RESPONSE TO POINT II OF THE PETITION)

Petitioner's second point for review is, to say the least, confusing. He does not state what the issue is or explain what he would have the Court decide. The subject matter of

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[5] We do not think it appropriate to dignify with a response Petitioner's outrageous contention that the District Courts within the Second Circuit, home to some of the most distinguished jurists in the federal system, are in "anarchy" or otherwise unable to decide discrimination cases fairly.

executive replacement tables was a straw man argument constructed by Petitioner in the courts below in an attempt to try to interject alleged "age" issues into the business decisions surrounding the 1995 demotion. IBM never claimed to deny any promotional opportunity to Petitioner based on such tables and he never identified any evidence suggesting that it did. Significantly, since the 1995 demotion claim was dismissed as time-barred, there is no reason to review any aspect of the bona fides of that decision. Moreover, as the District Court noted, the "replacement table" at issue in 1995 was the one for the head of the Tax Department and the only person on that "table" was Mr. Carney, who is older (and has longer service with IBM) than Petitioner, and who actually got the job in 1998.

This point was apparently given little thought by Petitioner, as seen in his reference to Title VII, rather than the ADEA. Additionally, there is no discussion of *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), in which this Court explained the distinction between decisions made based on age and those based on factors such as length of service (longevity) that merely correlate with age. Whatever can be made of Petitioner's argument, it appears to be foreclosed by *Biggins*.

III. PETITIONER HAS OFFERED NO REASON FOR THIS COURT TO RECONSIDER THE USE OF THE *McDONNELL-DOUGLAS* BURDEN SHIFTING FRAMEWORK IN THE SUMMARY JUDGMENT CONTEXT (RESPONSE TO POINT III OF THE PETITION)

Petitioner's final ground for review contends that this Court should abandon the use of *McDonnell Douglas* framework in evaluating summary judgment motions. This issue was not directly raised in the District Court and was

raised only in a footnote in the court of appeals. The abandonment of such a long-standing principle of law surely deserves greater airing in the courts below.

Moreover, Petitioner advocates jettisoning the *McDonnell Douglas* framework in favor of sending to a jury every case in which the plaintiff establishes a prima facie case. In so advocating, he exhibits no recognition of the particular use to which the phrase "prima facie case" is put in Title VII and ADEA jurisprudence. The phrase has two very different meanings. It can denote "[t]he establishment of a legally required rebuttable presumption," Black's Law Dictionary 1209 (7th ed. 1999), or it "may be used by the courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981) (citation omitted). Petitioner's argument is erroneously premised on the second definition. "*McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." *Id.*

Even without this error, the Petition has little to commend by way of reasons to bar the use of *McDonnell Douglas* in deciding summary judgment motions. The framework was "never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the question of discrimination." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). Indeed, several of the judges of the United States District Court for the Southern District of New York, including the judge who heard this case, have often cut through the formalities of *McDonnell Douglas* to engage in a more pragmatic evaluation of the overall case, when appropriate. *E.g., Minton v. Lenox Hill Hosp.*, 160 F. Supp. 2d 687, 693-94 (S.D.N.Y. 2001); *Peterson v. City College*, 32 F. Supp. 2d 675, 683-84

(S.D.N.Y. 1999); *Fierro v. Saks Fifth Ave.*, 13 F. Supp. 2d 481, 488 (S.D.N.Y. 1998); *Jalad v. Columbia Univ.*, 4 F. Supp. 2d 224, 234 (S.D.N.Y. 1998).

In the present case, the District Court knew it was not bound to rigidly apply the *McDonnell Douglas* framework but did so because it provided a sensible and orderly way to organize and evaluate the evidence. Petitioner's suggestion to review this case for the purpose of abandoning this useful tool—simply because the outcome displeased him—should be rejected.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

JOHN HOUSTON POPE
EPSTEIN BECKER & GREEN P.C.
250 Park Ave.
New York, New York 10177
(212) 351-4500

JAY GERBER *
HOGAN & HARTSON L.L.P.
875 Third Ave.
New York, New York 10021
(212) 918-3000

Counsel for Respondent
IBM Corporation

*Counsel of Record